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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 395

THE HONORABLE JAMES M. CARTER, JUDGE OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, ET AL., PETITIONERS

v.

OLYMPIC REFINING COMPANY AND THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xiii, R. 412–421) is reported at 332 F. 2d 260. The Findings of Fact and Conclusions of Law (R. 190–196, Pet. App. vii) and the oral opinion of the district court (R. 344–349, Pet. App. iii) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1964 (Pet. App. xiii). The petition for a writ of certiorari was filed on August 17, 1964. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

During pretrial proceedings in a government civil antitrust suit, the district court entered protective orders providing confidential treatment for answers to interrogatories that the government filed in that suit. The case was settled by a consent judgment. Subsequently, the plaintiff in a private antitrust action based upon the same violations charged in the government's suit sought access to those documents. The district court refused to vacate its protective orders, and the court of appeals reversed. The following questions are presented:

1. Whether the court of appeals, rather than this Court by virtue of the Expediting Act, had jurisdiction to review the refusal to vacate the protective orders.

2. Whether the court of appeals properly directed that the protective orders be modified to give the private antitrust plaintiff access to the documents, subject to reasonable restrictions to prevent unnecessary disclosure to others of any present trade secrets or presently sensitive competitive information in such documents.

STATUTES AND RULES INVOLVED

Section 2 of the Expediting Act of 1903, 15 U.S.C. § 29, provides:

> In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant,

an appeal from the final judgment of the district court will lie only to the Supreme Court.

The Publicity in Taking Evidence Act, 15 U.S.C. § 30, provides:

> In the taking of depositions of witnesses for use in any suit in equity brought by the United States under sections 1–7 of this title, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable.

Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), provides:

> (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

Rule 30(b) of the Federal Rules of Civil Procedure provides:

> ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

Rule 33 of the Federal Rules of Civil Procedure provides in part:

> * * * The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

STATEMENT

This controversy arose out of the efforts of respondent Olympic Refining Co. ("Olympic"), the plaintiff in a private antitrust case, to examine documents filed by the United States in a government antitrust suit that was terminated by a consent judgment (*United States* v. *Standard Oil Co. of California,* (S.D. Cal.), Civil 11584–C). The documents are answers to interrogatories served upon the government by several major oil companies who are petitioners here.[1] These petitioners were defendants in the government suit and two of them are also defendants in Olympic's suit.

The district court (Judge Carter) had entered three protective orders in the government case. The first order, entered on September 6, 1955, pursuant to a stipulation, provided for 15 days notice to the opposing party before answers to written interrogatories previously propounded by both sides would be filed with the court; it further provided that until the documents were filed, they would be kept confidential (Pet. App. ix, R. 133–135). Thereafter the United States gave notice that it would file its answers to the defendants' interrogatories, and over the government's objections, the second order was then entered sealing the material pending further orders by the court (Pet. App. x, R. 138–139). The government's answers consist of a list of witnesses it proposed to call at the trial of the

[1] Standard Oil Company of California, Shell Oil Company, Richfield Oil Corp., General Petroleum Corporation, Tidewater Oil Company, Union Oil Company and Texaco, Inc.

case, the factual contentions supporting the government's legal theory, and a summary of the evidence upon which those contentions rested (Pet. App. x, xii). The effect of the two orders was to defer until trial resolution of the issue of whether particular material was to be kept confidential (Pet. App. xi).

On June 19, 1959, after the district judge had stated that even if the government fully proved its case he would not grant the relief requested, the government, at the suggestion of the court, entered into a consent decree, providing for more limited relief, against all of the defendants except Texaco. *United States* v. *Standard Oil Co. of California,* 1959 Trade Cases ¶ 69,399, pp. 75,552, 75,527 (S.D. Cal.). In contemplation of trying the case against Texaco, the government had moved for production of the originals of the defendants' answers to interrogatories. Upon entry of the consent decree the court granted the motion but issued the third protective order which prohibited disclosure of such answers except as necessary in the course of the trial of the case against Texaco, or upon further order of the court (R. 140-141). The government subsequently dismissed the suit against Texaco (Pet. App. xi).

Olympic had filed a complaint under the antitrust laws on February 23, 1958, against Standard Oil Company of California and General Petroleum Corporation (two of the defendants in the government's case) in the Northern District of California. The complaint alleged substantially the same violations as had the government's complaint filed in the Southern Dis-

trict of California (R. 40–58). In the Northern District, Olympic made two attempts to obtain the sealed material through motions for production of documents addressed to the defendants. In both instances these motions were denied and Judge Burke, who ruled on the second motion, suggested that Olympic obtain a release of the material from Judge Carter (R. 12). Olympic thereupon served upon the Chief of the Los Angeles Office of the Antitrust Division a subpoena demanding production of the government's copies of its answers to the defendants' interrogatories, the originals of which were held under seal by the district court (R. 144).

Because the government was barred from releasing these documents by Judge Carter's protective orders, it filed a motion to vacate those orders (R. 145–156). Judge Carter denied the motion to vacate and quashed the subpoena (Pet. App. xii). He stated that it had been possible to settle the government's case by a consent decree largely because of the complete information made available to both sides by use of discovery (Pet. App. xi), and that "[t]he existence of the orders formed an important part of the consideration which defendants obtained in entering the consent decree in said action * * *" (Pet. App. xi). The court also said that Olympic was not prejudiced because (1) it could utilize normal discovery procedures in order to obtain the same information, and (2) the government's answers contain only contentions of counsel on the facts and law of the case (Pet. App. xii).

Olympic thereupon filed a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit, and the government intervened in that action in support of Olympic (see pp. 9–10, *infra*). The court of appeals reversed, and remanded the case to the district court for appropriate modifications of the protective orders (Pet. App. xxiii). It held:

1. That it, and not this Court, had jurisdiction to review the district court's refusal to vacate the protective orders (Pet. App. xvii–xviii).

2. That Olympic was entitled to have the protective orders "reconsidered as of this time, and modified in such form as to permit access to the documents subject to reasonable restrictions as to disclosure, whether or not some of the information contained in them may still be regarded as trade secrets or sensitive competitive information" (Pet. App. xxii).

ARGUMENT

1. The court of appeals correctly held that it, rather than this Court, had jurisdiction to review the district court's orders. Although the Expediting Act gives this Court exclusive jurisdiction over an appeal "from the final judgment" in any civil action brought by the United States under the antitrust laws, the Court recently held that the court of appeals rather than itself has jurisdiction over an appeal "from an ancillary order" entered in such an action determining a controversy that "is entirely between private parties and is outside the main stream of the litigation in which the Government is directly con-

cerned." *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers,* 375 U.S. 39, 40–41. The protective orders which are the subject of this litigation are in that category.

The government case has long since been terminated by dismissal as to one defendant and entry of a consent judgment against the others. The present controversy is a dispute between the parties in a private antitrust suit relating to discovery in that suit, and the government has no direct interest in its outcome. While the government was the moving party before Judge Carter in seeking to vacate the protective orders, it did so not because it had any direct interest in eliminating them, but because those orders barred it from complying with the subpoena calling for production of the documents which the orders covered. It was Olympic, and not the government, which sought the writ of mandamus in the court of appeals seeking to reverse Judge Carter's ruling. The government's participation in the court of appeals, in which it urged that the protective orders should be vacated, was basically that of an *amicus curiae.* Since the subpoena calling for the government attorney to produce the documents had been quashed, the government had no direct interest in reversing the district court's orders. Its interest in the proceeding before the court of appeals was only in the legal proposition which it urged, namely, that an interlocutory non-disclosure order entered in a government antitrust case should not be permitted to stand where its effect would be to interfere with legit-

imate discovery efforts in a private case based upon the same violations charged in the government's suit. The government pointed out to the court of appeals that, although its interest in the case was that of an *amicus*, it was intervening because that court, in an order extending the time for filing of briefs, had authorized the United States to intervene if it wished to participate (R. 204–205). Thus the fact that the government participated in this proceeding is in no way inconsistent with the court of appeals' holding (Pet. App. xvii) that the basic controversy over vacating the protective orders was "between private parties outside the main stream of the litigation in which the Government is directly concerned."

The cases upon which petitioners rely, in which courts of appeals were held to lack jurisdiction to review orders entered in government antitrust cases, are plainly distinguishable and, indeed, are in sharp contrast to the present controversy. *Terminal R. R. Assn.* v. *United States*, 266 U.S. 17, involved an interpretation of the final decree rendered in the government action; *United States* v. *California Canneries*, 279 U.S. 553, was an effort to modify the final decree; *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3) certiorari denied, 309 U.S. 687, involved an effort by a third party to intervene in opposition to the relief sought by the government; and *National Ass'n of Real Estate Boards* v. *United States*, 176 F. 2d 631 (C.A. D.C.) was an effort to appeal from the denial of a motion for

summary judgment in the government action. The issues in those cases, unlike the issue in the present controversy, were an integral part of the substantive contest between the government and the defendants.

2. The court of appeals properly directed the district court to modify the three protective orders in the government case so as to permit Olympic access to the government's answers to defendant's interrogatories in that case, subject to reasonable restrictions against unnecessary disclosure of trade secrets or sensitive competitive information. Contrary to petitioners' contention (Pet. 13–15), we do not read the opinion of the court of appeals as resting upon any general rule that a district court has no power ever to continue a protective order to bar disclosure of confidential material to the parties in another case. On the contrary, the court of appeals held only that, in the circumstances of this case, the district court's refusal to modify the protective orders was erroneous. For the court of appeals, after pointing out the grounds of the district court's decision—its findings that, "in the Government case, defendants waived objections to interrogatories, provided a fuller disclosure than might otherwise have been required of them, made possible the formulation of a consent decree, and agreed to such a decree (stipulated dismissal in the case of Texaco), all in reliance upon the entry and continuing effectiveness of the protective orders"—held: "None of these circumstances, in our opinion, support the view that these orders are not subject to modification to meet the reasonable

needs of other parties in other litigation" (Pet. App. xix).

This ruling was correct. Olympic was entitled to use the discovery procedures of the Federal Rules of Civil Procedure "to obtain the fullest possible knowledge of the issues and facts" in its lawsuit (*Hickman* v. *Taylor,* 329 U.S. 495, 501). Rules 30(b) and 33 of the Federal Rules of Civil Procedure, pursuant to which the district court originally entered the protective orders, did not, in the circumstances here shown, authorize the orders to be continued for the purpose of preventing the plaintiff in another action from obtaining discovery of the material which the orders covered. Rule 30(b) authorizes the district court to provide that "after being sealed the deposition shall be opened only by order of the court * * *," and Rule 33 makes Rule 30(b) applicable "for the protection of the party from whom answers to interrogatories are sought * * *." These provisions, which in terms merely provide for confidential treatment until further order of the court, do not give the court any blanket authority to continue indefinitely a protective order, entered in another case, which sealed answers to interrogatories because they contained trade secrets. Rather, the district court's duty, when the non-disclosure order is sought to be lifted, is to evaluate the situation as it then exists, in the light of (1) the need for the material by the parties in the other case, and (2) the injury that might result from disclosure. See 4 Moore, *Federal Practice,* 2034 (2d ed., 1950).

Where, as the court of appeals here held (Pet. App. xxii), the party in the other suit had a need for the material, and there was no showing that its disclosure to that party would cause serious injury, modification of the order to permit disclosure was proper, subject to appropriate terms and conditions upon use of the material.[2] The court of appeals applied that standard here. It remanded to the district court to modify the protective orders "in such manner that Olympic may have access to the documents in question for use in the Olympic case, subject to such reasonable restriction as may be necessary and practicable to prevent unnecessary disclosure of any present trade secrets or presently sensitive competitive information that may be contained in such documents" (Pet. App. xxiii).

The fact that the government case was terminated by a consent judgment did not justify the district court in continuing the protective orders. The con-

[2] This conclusion is supported by the basic policy of the Publicity in Taking Evidence Act, 15 U.S.C. 30. That Act provides that in the taking of depositions for use in any government civil antitrust suit "the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." As the court of appeals correctly ruled (Pet. App. xix-xx): "While this statute does not expressly apply to the acquisition of information by means of interrogatories or subpoenas duces tecum, the policy behind the enactment is equally applicable to these forms of discovery." The basic policy of the Act was to make available for public scrutiny all information obtained by the parties in government civil antitrust suits (see H. Rep. No. 1356, 62d Cong., 3d Sess., p. 2; 49 Cong. Rec. 2511-2514) and not merely, as petitioners argue (Pet. 15-16) evidence obtained in such suits.

sent judgment contained no provisions which, expressly or impliedly, barred disclosure of the documents. Nor did the district court find that the government agreed to continue the protective orders indefinitely. The only benefit which petitioners can claim from the consent judgment is that, by not having gone to trial, the judgment cannot be used against them by private plaintiffs as *prima facie* evidence of the violations established in the government suit, as would be the case under Section 5(a) of the Clayton Act had testimony been taken. But neither the language of Section 5 nor its policy of encouraging consent judgments indicates that it gives a consenting defendant the additional benefit of suppressing information which would otherwise be available to other litigants who had need of it. Such a result would hamper the "vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action." *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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